



Comptroller General
of the United States

Washington, D.C. 20548

146-414

Decision

Matter of: Nicholas P. Davis
File: B-246364
Date: April 14, 1992

DIGEST

Agency has determined that employee, whose duties as a Security Guard expose him to hazardous materials and high noise levels, has been effectively safeguarded by the agency. Therefore, the criteria for payment of a hazard duty pay differential has not been met. The entitlement to hazard duty pay differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency unless that judgment was clearly wrong, arbitrary, or capricious. Further, since the hazardous duties performed by the employee have been taken into account in the classification of the position, payment of the differential is prohibited by 5 U.S.C. § 5545(d) (1) and 5 C.F.R. § 550.904(a) (1991). The claim is denied.

DECISION

This decision is in response to an appeal by Mr. Nicholas P. Davis, an employee of the Department of Energy (DOE), of the settlement action by our Claims Group which denied his claim for the payment of a hazard duty pay differential.¹ The denial of the claim is affirmed.

Mr. Davis is employed as a Security Guard, GS-085-6. He is exposed to hazardous materials and high noise levels as an escort in transporting those materials by air and ground conveyances. Mr. Davis' claim for payment of a hazard duty pay differential was denied by DOE.

Mr. Davis argues that some of the containers used to hold the hazardous materials were put into service almost 30 years ago and that their integrity is questionable. He points out that labels on the containers warn of the hazardous contents and are not to be carried on passenger aircraft. Mr. Davis also contends that although the ear protection devices reduce the noise levels to acceptable

¹Settlement Certificate Z-2867267, Aug. 15, 1991.

levels, the escorts wear them for eight or more hours a day for up to 5 days which causes dryness to the ear canal, which in turn causes irritation to the ear. He states that the ear protection devices also cause pressure on the tympanic membrane due to cabin pressure changes on take off and landing.

Mr. Davis also points out that, effective March 4, 1991, section 203 of the Federal Employees Pay Comparability Act of 1990 removed the restriction that hazardous duty must be "irregular or intermittent." He states that since this portion of the statute was deleted and was the major basis for denial of his claim by the Claims Group's settlement action, he asks that the action be reconsidered.

Mr. Davis requests that this matter be investigated by the General Accounting Office (GAO) by in-person, on-site interviews, in order to obtain a true picture of the actual duties performed by the security guards.

The record shows that by Position Classification Appeal Decision dated April 5, 1991, the Office of Personnel Management (OPM) audited the position, Transportation Escort, GS-303-6, occupied by Mr. Davis and five other employees. The OPM considered the risks and discomforts in the employees' physical surroundings, the nature of the work assigned, and the regulations required. The OPM decision concluded that their work is subject to regular and recurring exposure to moderate risks such as explosives and hazardous/toxic materials, and was factored in as an element in establishing the grade of the position. The OPM concluded that the position is properly classified as Security Guard, GS-085-6.

By letter dated June 5, 1991, addressed to Mr. Davis, OPM referred to its classification appeal decision of April 5, 1991. The OPM stated that it found that Mr. Davis' position was properly classified as a Security Guard, GS-085-6 and that hazardous duty was used in determining the classification of the position. It was pointed out that although the restriction that hazardous duty must be "irregular or intermittent" has been removed, the law still prohibits payment of the hazard duty pay differential when the hazardous duty has been taken into account in the classification of the position, whether or not the hazardous duty is grade controlling.

In its letter dated June 21, 1991, DOE states that it has determined that the agency has developed effective safeguards to prevent any potential exposure to employees who may come in contact with the transported items by testing and approving the containers used in transporting the hazardous materials. As to exposure to high noise levels

associated with jet engines, a study conducted by the Transportation Safeguards Division concluded that as long as the employees use the provided hearing protection, noise levels are within acceptable levels. The DOE concluded that the circumstances involved in Mr. Davis' claim do not, in the opinion of the agency, meet the criteria for payment of a hazard duty pay differential.

In the area of environmental differential pay, we have consistently held that the determination of whether a particular situation warrants payment of a hazard duty pay differential is vested primarily in the employing agency. We will not substitute our judgment for that of the agency officials who are in a better position to investigate and resolve the matter, unless there is clear and convincing evidence that the agency's decision was wrong or that it was arbitrary and capricious.²

Here, the evidence shows that DOE has developed effective safeguards to prevent any potential exposure by Mr. Davis and other security guards to the hazardous materials and has conducted a study which shows that noise levels to which the employees are subjected are within acceptable levels. Mr. Davis concurs with the latter conclusion. Further, he has not presented any evidence to demonstrate that DOE has acted in an unreasonable manner in researching the durability of the containers and in following the findings of its study of noise levels experienced by the affected employees. Therefore, we are unable to conclude that DOE was either wrong or acted arbitrarily or capriciously in denying Mr. Davis' claim for a hazard duty pay differential.

Finally, since the hazardous duties performed by Mr. Davis have been taken into account in the classification of his position, payment of a hazard duty pay differential is prohibited.³

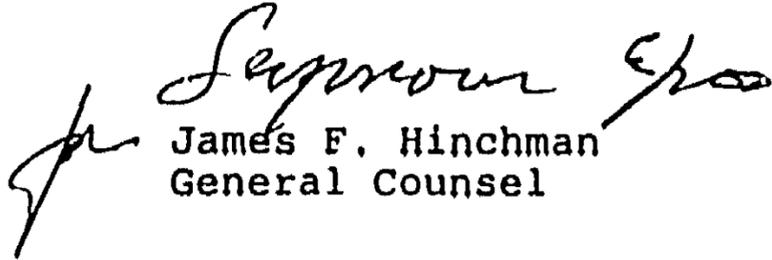
In response to Mr. Davis' request that GAO investigate the matter and conduct in-person, on-site interviews, claims are settled by this Office on the basis of the facts established by the agency concerned and by evidence submitted by the claimant. The burden is on the claimant to establish the

²See AFGE Local 2413, 67 Comp. Gen. 489, 491 (1988) and cases cited therein.

³See Pub. L. 101-509, Title 2, § 203, 104 Stat. 1439, 1456, and codified at 5 U.S.C. § 554 5(d)(1), 1991 Cum. Ann. Pocket Part; 5 C.F.R. § 550.904(a) and (b)(2) (1991).

liability of the United States and his right to payment.
Our decisions are based upon the written record only.⁴

Accordingly, the denial of the claim by our Claims Group is affirmed.


James F. Hinchman
General Counsel

⁴See 4 C.F.R. § 31.7 (1991).